IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY SAUL ROSALES,

Petitioner, No. CIV S-03-0230 JAM DAD (TEMP) P

vs.

THOMAS L. CAREY, Warden, et al., FINDINGS AND RECOMMENDATIONS

Respondents.

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Petitioner is a state prisoner proceeding with counsel on a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He challenges the California Board of Parole Hearings' ("the Board") decision to deny him parole in 2000. Petitioner raises the following claims: (1) his right to due process was violated because there is no evidentiary support for or rational connection between the Board's findings and conclusions; (2) his right to due process was violated because the Board found him unsuitable for parole as a result of his failure to meet conditions which he had already met; (3) his right to due process was violated because the Board did not engage in individualized decision-making and instead implemented an unwritten policy to deny parole to all murderers; (4) his Eighth Amendment right to be free of cruel and unusual punishment was violated when the Board conducted a pro forma hearing that did not allow him

to demonstrate his suitability for parole; and (5) his due process and Eighth Amendment rights were violated by the Board's de facto sentence of life without parole, depriving petitioner of the benefit of his plea bargain.

I. Procedural Background

The original federal habeas petition was filed in this case on February 5, 2003, by petitioner proceeding without counsel. (Doc. No. 1.) The then-assigned Magistrate Judge appointed counsel for petitioner and directed the parties to file a joint scheduling statement. (Doc. No. 4 & 6.) Based upon representations made in that joint scheduling statement, the court directed petitioner's counsel to inform the court whether petitioner would be seeking a stay of this action in order to permit his exhaustion of additional claims in state court. (Doc. No. 8.) On November 20, 2003, the court granted petitioner's unopposed request for a stay pending exhaustion of his additional claims. (Doc. No. 15.) On December 10, 2004, petitioner filed a request to lift the stay and submitted his amended petition and, on July 1, 2005, respondent answered the amended petition. (Doc. Nos. 21 and 25.) Petitioner filed a traverse on September 16, 2005. (Doc. No. 30.)

On October 22, 2008, the assigned district judge stayed this case pending the Ninth Circuit's en banc decision in Hayward v. Marshall. (Doc. No. 34.) On May 21, 2010, the district court lifted the stay and asked the parties for letter briefs on the impact of the Ninth Circuit's en banc decision in Hayward. (Doc. No. 35.) However, on January 24, 2011, the United States Supreme Court issued its decision in Swarthout v. Cooke, 562 U.S. ___ , ___, 131 S. Ct. 859, 861-62 (2011), thereby altering the legal landscape with respect to federal habeas review of the denial of parole to state prisoners. The action stands submitted for decision.

II. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.

Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court's decision does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review of a habeas petitioner's claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) ("[I]t is now clear both that we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised.").

The court looks to the last reasoned state court decision as the basis for the state court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). See also Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005) ("When more than one state court has adjudicated

a claim, we analyze the last reasoned decision"). If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state court decision, this court may consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002). When it is clear that a state court has not reached the merits of a petitioner's claim, AEDPA's deferential standard does not apply and a federal habeas court must review the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

III. Scope of Review Applicable to Due Process Challenges to the Denial of Parole

The Due Process Clause of the Fourteenth Amendment prohibits state action that deprives a person of life, liberty, or property without due process of law. A litigant alleging a due process violation must first demonstrate that he was deprived of a liberty or property interest protected by the Due Process Clause and then show that the procedures attendant upon the deprivation were not constitutionally sufficient. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459-60 (1989).

A protected liberty interest may arise from either the Due Process Clause of the United States Constitution "by reason of guarantees implicit in the word 'liberty,'" or from "an expectation or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209, 221 (2005). See also Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States Constitution does not, of its own force, create a protected liberty interest in a parole date, even one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981); Greenholtz v. Inmates of Neb. Penal, 442 U.S. 1, 7 (1979) (There is "no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). However, a state's statutory scheme, if it uses mandatory language, "creates a presumption that parole release

will be granted" when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest. Greenholtz, 442 U.S. at 12. See also Allen, 482 U.S. at 376-78.

California's parole scheme gives rise to a liberty interest in parole protected by the federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout v. Cooke, 131 S. Ct. at 861-62 (finding the Ninth Circuit's holding in this regard to be a reasonable application of Supreme Court authority); Pearson v. Muntz, 639 F.3d 1185, 1191 (9th Cir. 2011) ("[Swarthout v.] Cooke did not disturb our precedent that California law creates a liberty interest in parole.") In California, a prisoner is entitled to release on parole unless there is "some evidence" of his or her current dangerousness. In re Lawrence, 44 Cal.4th 1181, 1205-06, 1210 (2008); In re Rosenkrantz, 29 Cal.4th 616, 651-53 (2002).

In Swarthout, the Supreme Court reviewed two cases in which California prisoners were denied parole - in one case by the Board, and in the other by the Governor after the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment requires fair procedures, "and federal courts will review the application of those constitutionally required procedures." Id. at 862. The Court concluded that in the parole context, however, "the procedures required are minimal" and that the "Constitution does not require more" than "an opportunity to be heard" and being "provided a statement of the reasons why parole was denied." Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit decisions that went beyond these minimal procedural requirements and "reviewed the state courts' decisions on the merits and concluded that they had unreasonably determined the facts in light of the evidence." Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected the application of the "some evidence" standard to parole decisions by the California courts as a

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component of the federal due process standard. Id. at 862-63. See also Pearson, 639 F.3d at 1191.[1]

IV. The Guilty Plea and Decisions From the Parole Board and State Courts

In his underlying criminal case in state court, petitioner pleaded guilty to second degree murder and assault with the intent to commit murder and admitted that he inflicted great bodily injury. Answer (Ans.), Ex. A at 43. During the plea colloquy, the prosecutor advised petitioner of the parole implications of his guilty plea and the sentence of fifteen years to life, as follows:

> [A]s the judge told you, you must do two-thirds of that sentence before you are eligible for parole which means that you could do a minimum of ten years.
>
> This does not mean that you will be paroled at the end of ten years.
>
> It only means that you will be eligible for parole at the end of ten years provided you earn both good time and work time credits.
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> If you do not earn good time or work time credits, you would be eligible for parole at a period of time of 15 years.
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> However, again, that just means you would be eligible for parole at that time. It does not mean that you would, in fact, be paroled at the end of 15 years.

Ans., Ex. A at 49. Later during the colloquy, defense counsel noted:

> I think there is a question in my mind that the corrections board might interpret–even though the court pursuant to a plea bargain imposes a sentence to run concurrent on Counts II, III and IV–that the use allegation therein might be utilized to extend the time that he would be eligible for parole; that it is our understanding that that would not be the case and the sentence would be to run concurrent and not be used to extend the base time of Count I.

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[1] In its per curiam opinion, the Supreme Court did not acknowledge that for twenty-four years the Ninth Circuit had consistently held that in order to comport with due process a state parole board's decision to deny parole had to be supported by "some evidence," as defined in Superintendent v. Hill, 472 U.S. 445 (1985), that bore some indicia of reliability. See Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); McQuillion v. Duncan, 306 F.3d 895, 904 (9th Cir. 2002) ("In Jancsek . . . we held that the process that is due in the parole rescission setting is the same as the Supreme Court outlined in Superintendent v. Hill . . . .")

Ans., Ex. A at 61. The prosecutor also explained in petitioner's presence:

> [T]he Board of Prison Terms . . . will consider the entire case and the entire record of the defendant in setting an initial parole date.
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> That would be what counts were charged, what counts were dismissed, his total background, whether he has ever been in trouble before and all those things in determining the first eligible parole date.
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> I was told by the Board of Prison Terms that they could not give me even an average as to what the first initial parole time period would be since they are in the process of making up a matrix . . . .
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> [H]e isn't going to get an additional three years for the GBI . . . because they are going to be running concurrent.
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> . . . . . .
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> [T]here cannot be an eligibility for parole prior to the ten years; but that the actual term to be served will be fixed by the . . . Board of Prison Terms and Parole.
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> . . . . . .
>
> So it is possible, after they have interviewed him and everything, that it is possible that he would be eligible for parole at the end of ten years.

Ans., Ex. A at 62-63.

Finally, the prosecutor stated:

> . . . This is a fluid thing that could fluctuate at any time during the time of your course of stay there depending not only upon your background and the crimes you are pleading to up to date, but anything you might do in the future.

Ans., Ex. A at 64. The prosecutor then asked petitioner if he understood "that there is absolutely no guarantee that the Board of Prison Terms will set your first eligibility date at the 15 years less the one third." Ans., Ex. A at 65. Petitioner responded that he understood. Id.

Following his entry of plea, petitioner was sentenced to a total aggregate term of fifteen years to life in state prison. Ans. Ex. A at 50 (discussion of concurrent terms imposed on other charges). When he reached prison, petitioner's minimum eligible parole date was

determined to be June 26, 1989 and he appeared before the Board in 1989, 1991, and 1995. See, e.g., Ans, Ex. A at 217.

On May 24, 2000, the Board again considered petitioner's case. Petitioner did not appear before the Board at that time, but he instead allowed counsel to represent his interests at the hearing. The Board listened to counsel's presentation, argument by a representative of the Los Angeles County District Attorney's Office, and statements from the murder victim's mother and sister. The Board then ruled:

> The Board has considered Mr. Rosales' case and we've denied his parole for a four year period. I'm going to read the decision. The Panel reviewed all the information received from the public and relied on the following circumstances in concluding that the prisoner is not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. Number one was the commitment offense, which the Panel finds was carried out in an especially cruel and callous manner. Multiple victims were attacked and injured or killed in the same incident. And the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. These conclusions are drawn from the Statement of Facts wherein the petitioner burglarized the victim's vehicle, and the victim, accompanied by three other victims, confronted Mr. Rosales. They realized that he had taken property from the victim's vehicle. They attempted to detain him and call the police. he took objection to this. He pulled out a large knife and began stabbing the victims who were defenseless at that point. Stabbed each of the victims resulting in the death of one victim and the critical injury to other three victims . . . who . . . survived the incident, received extensive injuries which have caused them a life time of problems, including the inability to bear children as a result of the actions of Mr. Rosales. Regarding his institutional behavior, he has programmed fairly well while he's been in the institution. He has upgraded vocationally. He had participated in a number of self-help programs including contemplated [sic] meditation, AA, and Alternatives to Violence, for which he should be commended, as least for that participation. Response to 3042 notices, we did have significant opposition to parole for Mr. Rosales. We received correspondence from Los Angeles County Sheriff's Department . . . . We had a representative from the District Attorney's Office in Los Angeles who was here to oppose parole. We also had two family members . . . [who] voiced opposition to parole . . . . We have resolutions from a number of city councils in the area opposing parole for Mr. Rosales . . . . We have quite a few letters with what are easily hundreds and hundreds of signatures from individuals opposing parole for Mr. Rosales.

> And the Panel makes the following findings: That the prisoner continues to need therapy in order to face, discuss, understand and cope with stress in a non-destructive manner. Until further progress is made, the prisoner continues to be unpredictable and a threat to others. He should be commended for his positive programming though. He has remained disciplinary-free for an extended period . . . . He has upgraded vocationally. He has participated in self-help programs. However, those positive aspects of his behavior do not outweigh the factors of unsuitability.

Ans., Ex. A at 167-69.

In separately denying parole for a period of four years in petitioner's case, the Board noted:

> The Panel also finds that Mr. Rosales needs additional therapy in order to examine his apparent hostility toward women and to develop an understanding of the profound impact his actions have had on the lives of the victims and the victim's families. In addition, it is very difficult to adequately assess Mr. Rosales' level of insight into the commitment offense in as much as he has declined to attend this hearing and discuss the matter with the Board.

Ans., Ex. A at 170.

Petitioner pursued administrative remedies and then, still acting pro per, filed petitions for writ of habeas corpus in the Sacramento County Superior Court, the California Court of Appeal, and California Supreme Court, arguing that the Board's unsuitability finding was not supported by "some evidence;" that its finding that he needed further therapy lacked evidentiary support; that the Board abused its discretion in denying parole for four years; that the Board has changed petitioner's sentence to one of life imprisonment without the possibility of parole, which is disproportionate to his crime; that California Penal Code §§ 12 and 13 have been violated by the refusal to impose a definite sentence; and that the Board erred in not setting a parole date in his case. Ans., Ex. C at 16-55. The Sacramento County Superior Court issued the only reasoned decision in denying petitioner state habeas relief, reasoning as follows:

> The callous nature of the commitment offense provides "some evidence" of Petitioner's unsuitability for parole and is good cause for a 4 year suitability denial.

Ans., Ex. C at 250.

After counsel was appointed in this federal habeas action, petitioner returned to the state courts, this time arguing that there was no rational relationship connection between the Board's findings and the denial of parole and no evidentiary support for the Board's findings; that his rights were violated when the Board denied him parole for failure to meet conditions which he had already met; that the Board did not engage in individualized decision making but instead relied on the "no parole" policy; that his right to be free of cruel and unusual punishment was violated because the Board subjected him to a pro forma hearing which made it impossible for him to demonstrate his suitability for release on parole; and that his right to be free of cruel and unusual punishment was violated when the Board's actions, in essence, imposed a sentence of life imprisonment without the possibility of parole. The Los Angeles County Superior Court denied the petition raising these claims on the grounds of untimeliness. Petitioner's Exhibits, Ex. 11.[2] Thereafter, petitioner again sought habeas relief in the California Supreme Court raising these same new claims and that court issued a one-line denial of his petition. Id., Ex. 12.

V. The Board's Finding That Petitioner Was Unsuitable For Parole (Claims One and Two)

Petitioner seeks federal habeas relief on the grounds that the Board's decision in 2000 to deny him parole, and the findings upon which that denial was based, were not supported by "some evidence" as required under California law. However, under the Supreme Court's decision in Swarthout, this court may not review whether California's "some evidence" standard was correctly applied in petitioner's case. 131 S. Ct. at 862-63; see also Miller v. Oregon Bd. of Parole and Post-Prison Supervision, 642 F.3d 711, 716 (9th Cir. 2011) ("The Supreme Court held in [Swarthout v.] Cooke that in the context of parole eligibility decisions the due process

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[2] Although respondent's counsel mentions the Los Angeles County Superior Court's ruling on this petition in her answer, she does not argue that any of petitioner's claims for federal habeas relief are procedurally barred. The court therefore deems any reliance on procedural bar to have been waived. Cone v. Bell, __ U.S. __, ___,129 S. Ct. 1769, 1791, n. 6 (2009) ("[P]rocedural default may be waived if it is not raised as a defense.")

right is *procedural*, and entitles a prisoner to nothing more than a fair hearing and a statement of reasons for a parole board's decision[.]"); Roberts v. Hartley, 640 F.3d 1042, 1046 (9th Cir. 2011) (under the decision in Swarthout, California's parole scheme creates no substantive due process rights and any procedural due process requirement is met as long as the state provides an inmate seeking parole with an opportunity to be heard and a statement of the reasons why parole was denied); Pearson, 639 F.3d at 1191 ("While the Court did not define the minimum process required by the Due Process Clause for denial parole under the California system, it made clear that the Clause's requirements were satisfied where the inmates 'were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied.'")

The federal habeas petition pending before the court in this case reflects that petitioner was represented by counsel at his 2000 parole suitability hearing. The record also establishes that at that hearing petitioner was given the opportunity to be heard and received a statement of the reasons why parole was denied by the Board panel. That is all the process that was due petitioner under the Constitution. Swarthout, 131 S. Ct. 862; see also Miller, 642 F.3d at 716; Roberts, 640 F.3d at 1046; Pearson, 639 F.3d at 1191. It now plainly appears that petitioner is not entitled to relief with respect to his due process claims. Accordingly, petitioner is not entitled to federal habeas relief with respect to his claim that the Board failed to properly apply California's "some evidence" standard and thereby violated his right to due process in denying him parole in 2000.[3]

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[3] In his petition and traverse, petitioner contends that the Board failed to comply with state laws and regulations when it found him unsuitable for parole at his May 2000 hearing. Petitioner's arguments that the state court erred in applying state law are not cognizable in this federal habeas corpus proceeding. See Rivera v. Illinois, ___ U.S. ___, 129 S. Ct. 1446, 1454 (2009) ("[A] mere error of state law . . . is not a denial of due process") (quoting Engle v. Isaac, 456 U.S. 107, 121, n. 21 (1982) and Estelle v. McGuire, 502 U.S. 62, 67, 72-73 (1991)). A habeas court may not grant the writ on the basis of errors of state law where, as here, the combined effect of those errors does not violate the Federal Constitution. Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Parle v. Runnels 387 F.3d 1030, 1045 (9th Cir. 2004).

VI. Reliance On The "No Parole" Policy And Individualized Decision Making (Claim 3)

Petitioner argues that the Board did not engage in individualized decision making in denying him parole because they relied on California's "no parole policy." In support of this contention, petitioner offers the declaration of Albert Leddy, who was a Commissioner and then the Chairman of the Board of Prison Terms until his retirement in 1992. Petitioner's Exhibits 7 ¶ 2. Leddy avers that former Governor Pete Wilson installed commissioners who favored a "no parole" policy and that thereafter, the number of inmates paroled declined precipitously. Id. at ¶¶ 5, 14. Petitioner also offers a portion of a deposition of a Edmund Tong, who is not further identified by petitioner, but who discusses in the except of his testimony changes in the Board of Prison Terms under Governor Wilson. According to Mr. Tong, under prior administrations, the Board panel was concerned that the regulations be followed, but this changed during the Wilson administration Id., Ex. 8 at 48: 1-9. He also identified two commissioners, John Gillis and Ron Koenic, who he believed reached their parole decisions based on their perception of what the governor wanted them to do. Id., Ex. 8 at 106: 16-20. In addition, petitioner has submitted the transcript from a 1999 legislative hearing on parole, which examined former Governor Wilson's impact on the parole system in California.

Petitioner is entitled to a parole hearing before an unbiased decision maker who considers his case individually. O'Bremski v. Maass, 915 F.3d 418, 422 (9th Cir. 1990). Contrary to petitioner's claim, the record before this court reflects that the Board panel examined the facts of petitioner's case in reaching its decision. Moreover, petitioner's "proof" of the Board's alleged bias is little but speculation and hearsay and concerns a period before the May 2000 suitability hearing that petitioner challenges here. Finally, nothing in petitioner's supporting evidence shows that the Board panel members hearing his case – Commissioners Hepburn, Munoz and Cater – were appointed by Governor Wilson, were influenced by that governor's views (even assuming those views have been proven) or embraced a no-parole policy themselves. Petitioner has failed to satisfy his burden of establishing that he is entitled to relief

in these habeas proceedings. Tidwell v. Marshall, 526 F. Supp.2d 1031, 1046 (C.D. Cal. 2007) (where a habeas petitioner broadly claims that a Board panel was biased he bears the burden of producing evidence demonstrating bias) see In re Morrall, 102 Cal. App.4th 280, 285 (2003) ("political rhetoric does not establish such a blanket policy").

VII. The Denial Of Parole And The Eighth Amendment (Claim 4)

Petitioner argues that the Board wantonly inflicts unnecessary pain on petitioner in administering his sentence in violation of the Eighth Amendment. In advancing this argument petitioner relies on two capital cases, Atkins v. West Virginia, 536 U.S. 304 (2002) and Gregg v. Georgia, 428 U.S. 153 (1977), for the proposition that the Eighth Amendment is violated when punishment involves the unnecessary and wanton infliction of pain without penological justification wholly apart from the proportionality of the punishment. Second Amended Petition at 17. Petitioner cites nothing to suggest that this branch of Eighth Amendment jurisprudence has any application outside the capital context. Indeed, citing Gregg, the Ninth Circuit has recognized that "[i]n the context of executions, the Eighth Amendment prohibits punishments that involve the unnecessary and wanton infliction of pain . . . ." Beardslee v. Woodford, 395 F.3d 1064, 1070 (9th Cir. 2005) (internal citation & quotation omitted). Moreover, the Ninth Circuit has said that any emotional trauma from dashed expectations concerning parole "does not offend the standards of decency in modern society." Baumann v. Arizona Department of Corrections, 754 F.2d 841 (9th Cir. 1985). See also Bowens v. Sisto, No. CIV S-08-CV-1489 LKK CHS, 2011 WL 2198322, at *8 (E.D. Cal. June 6, 2011) ("Petitioner fails to articulate how the denial of parole to an inmate serving an indeterminate life sentence constitutes cruel and unusual punishment, particularly where a parole grant in this context would effectively reduce his presumptively valid maximum sentence of life imprisonment."); Grant v. Swarthout, No. 2:06cv02842-RCT, 2010 WL 3941926, at *2 (E.D. Cal. Oct. 6, 2010); Gross v. Quarterman, Civil Action No. H-04-136, 2007 WL 4411755 at *12 (S.D. Tex. 2007) ("denying parole and

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requiring an inmate to serve his entire sentence is punishment, but it does not constitute cruel and unusual punishment.").

To the extent that petitioner is raising a proportionality challenge to his sentence, he fares no better. With the exception of capital cases, successful Eighth Amendment challenges to the proportionality of a sentence have been "exceedingly rare." Rummel v. Estelle, 445 U.S. 263, 272, (1980). See also Solem v. Helm, 463 U.S. 277, 289-90 (1983); Ramirez v. Castro, 365 F.3d 755, 775 (9th Cir. 2004. The Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime. Solem, 463 U.S. at 288, 303; Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring). A life sentence for murder, even without the possibility of parole, is not constitutionally disproportionate. Harris v. Wright, 93 F.3d 581, 583-585 (9th Cir. 1996); United States v. LaFleur, 971 F.2d 200, 211 (9th Cir.1991) ("[I]t is clear that a mandatory life sentence for murder does not constitute cruel and unusual punishment."); see also Harmelin, 501 U.S. at 1009 (upholding a sentence of life imprisonment with no possibility of parole for a first offense crime of possession of 672 grams of cocaine as not being disproportionate).

VIII. Violation Of The Plea Bargain (Claim 5)

Plea agreements are contractual in nature and are construed using the ordinary rules of contract interpretation. United States v. Transfiguracion, 442 F.3d 1222, 1228 (9th Cir. 2006); Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003). Courts will enforce the literal terms of the plea agreement but must construe any ambiguities against the prosecution. United States v. Franco-Lopez, 312 F.3d 984, 989 (9th Cir. 2002). "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). In construing a plea agreement, this court must determine what petitioner reasonably believed to be its terms at the time of the plea. United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992), as amended, 990 F.2d 1163 (9th Cir. 1993).

Petitioner argues that the Board's 2000 decision to deny him parole has converted his sentence into a term of life imprisonment without the possibility of parole, which deprives him of the benefit of his plea bargain. In this regard, petitioner contends that he was promised that the concurrent assault charges would not extend his sentence and that he would be paroled if he behaved in prison. This argument is without merit.

The record before the court reflects that the prosecutor in petitioner's state court criminal case did not promise that the Board would ignore the facts of the concurrent counts in setting a parole date. In fact, the prosecutor specifically informed petitioner that the Board would consider "what counts were charged, what counts were dismissed, his total background" in considering petitioner's suitability for parole. Ans., Ex. A at 62. In addition, the prosecutor did not promise petitioner that he would be paroled if he behaved himself in prison; rather, he told petitioner that accruing good time and work time would effect his minimum eligibility for parole, not that it would guarantee him a parole date. Ans., Ex. A at 49. The prosecutor's final admonishment to petitioner during the plea colloquy was that the eligibility for parole was "a fluid thing," words that cannot be interpreted to contain any sort of promise that petitioner would be paroled by a certain date or at all. Ans., Ex. A at 64.

Therefore, petitioner is not entitled to federal habeas relief with respect to his claim that the Board's decision to deny him parole in 2000 constituted a violation of his plea bargain in the underlying criminal prosecution.

CONCLUSION

Accordingly, for the reasons set forth above, IT IS HEREBY RECOMMENDED that the petition seeking federal habeas relief be denied and this case closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

"Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within twenty-one days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

In any objections he elects to file, petitioner may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant); Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of appealability to review the denial of a habeas petition challenging an administrative decision such as the denial of parole by the parole board), overruled in part by Swarthout, 562 U.S. ___ , 131 S. Ct. 859 (2011).

DATED: July 30, 2011.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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